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## Of Form and Function: Lockean Political Philosophy and Mass Tort

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# Of Form and Function: Lockean Political Philosophy and Mass Tort

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\* Associate, Jones Day; J.D. 2007, Harvard Law School. The views set forth herein are the personal views of the author and do not necessarily reflect those of the law firm with which he is associated or any clients he has represented. The author further stresses that this Article does not endorse any particular system of tort reform, but instead argues that any objections to tort reform should be based on the comparative efficacy of reform proposals to the status quo, rather than on a mere fondness for the traditional tort system.

## I. INTRODUCTION

The efficacy of tort law in the United States has been widely criticized by academics and judges.<sup>1</sup> In the mass tort context, a great deal of criticism has focused on the inefficiencies created by individual claim autonomy—the notion that every person is entitled to his or her own day in court. Attempts to individually adjudicate mass tort cases, such as asbestos and other mass-exposure cases, have clogged court dockets and substantially burdened the civil justice system.<sup>2</sup> Some scholars argue that the process of individually litigating mass tort claims and allowance of opt-out rights in class actions lead to suboptimal investment by plaintiffs.<sup>3</sup> Further, the concentrated interests of mass tort defendants—who may expect numerous similar suits—endow them with an “asymmetric scale advantage” to invest in litigation.<sup>4</sup> On the other hand, defendants are forced to re-litigate issues across multiple jurisdictions, risking inconsistent judgments, facing prolonged uncertainty, and incurring ever-growing legal expenses. Similar and overlapping issues, such as design defect and failure to warn, have motivated courts to attempt aggregation of mass tort cases into class actions.<sup>5</sup> Yet these attempts have been frustrated by the strong presumption in American jurisprudence that every individual has a right to a day in court.<sup>6</sup>

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1. See, e.g., GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* 1–34 (1970); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 169–71 (7th ed. 2007); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); Robert Rabin, *Law for Law's Sake*, 105 YALE L.J. 2261, 2279–83 (1996) (reviewing ERNEST WEINRIB, *THE IDEA OF PRIVATE LAW* (1995)); David Rosenberg, *The Causal Connection in Mass Exposure Cases: A “Public Law” Vision of the Tort System*, 97 HARV. L. REV. 851 (1984); [hereinafter Rosenberg, *Causal Connection*].
  2. See, e.g., Francis E. McGovern, *The Tragedy of the Asbestos Commons*, 88 VA. L. REV. 1721, 1725 (2002).
  3. See David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 847–49 (2002); McGovern, *supra* note 2, at 1741–44.
  4. David Rosenberg, *Adding a Second Opt-Out to Rule 23(b)(3) Class Actions: Cost Without Benefit*, 2003 U. CHI. LEGAL F. 19, 28–29; see Rosenberg, *supra* note 3, at 852–53; McGovern, *supra* note 2, at 1741–44.
  5. See, e.g., Michael Perino, *Class Action Chaos? The Theory of the Core and an Analysis of Opt-Out Rights in Mass Tort Class Actions*, 46 EMORY L.J. 85, 93–94 (1997).
  6. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (referring to “our deep-rooted historic tradition that everyone should have his own day in court” (quoting *Martin v. Wilkes*, 490 U.S. 755, 762 (1989) (internal quotation marks omitted))); McGovern, *supra* note 2, at 1745 (noting that “there has been no further judicial effort to coerce future asbestos plaintiffs into a predefined payment mode” since the Supreme Court rejected the settlement in *Amchem Prods. v. Windsor*, 521 U.S. 591 (1997) and the Court’s decision in *Ortiz*, 527 U.S. 815 (finding a proposed mandatory settlement class improperly certified under *Federal Rule of Civil Procedure* 23)).

In the face of academic criticism and judicial pleas for help, others support individual claim autonomy as a means to preserve the notion of corrective justice.<sup>7</sup> Rather than focus on the efficacy of tort law at serving societal functions, corrective justice proponents often argue tort law is inherently self-justifying, which, of course, begs the question: "Why does tort law exist?"<sup>8</sup> In addressing that question, this Article examines the political philosophy of John Locke and argues that legal formalism is necessary for restraining government and instilling the rule of law but that the particular form of law adopted by a jurisdiction should reflect society's substantive policy goals. The law's form should reflect its function.

Part II of this Article provides an overview of America's mass tort debate. Part III proceeds to defend rule-of-law formalism in so far as it serves society's needs but rejects arguments for retaining certain legal formalities merely for tradition's sake. Part IV discusses the political philosophy of John Locke and reveals Lockean political philosophy's implications for the relationship between form and function in the law in general and the mass tort problem in particular.

## II. THE MASS TORT PROBLEM

The common law tort system provides a civilized means for an injured party to address a grievance against an alleged tortfeasor and seek compensation for harm.<sup>9</sup> This system has been said to have many (at times overlapping and inconsistent) functions, including corrective justice, optimal deterrence, loss distribution, compensation, and redress of social grievances.<sup>10</sup> The American tort system was developed in Great Britain prior to the Industrial Revolution, was exported to the United States, and has evolved under the watch of judges practicing the common law tradition.

Despite its developments, the modern tort system is largely a vestige of a simpler time. The tort system is an expensive and inefficient method for achieving any of its purported goals. A 1986 study estimated that plaintiffs typically turn over one-third of their damage

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7. See, e.g., Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69 (1989).

8. See ERNEST WEINRIB, *THE IDEA OF PRIVATE LAW* 1–5 (1995) ("[T]he purpose of private law is to be private law.").

9. For a discussion of the theoretical and practical reasons a society may choose to prohibit certain externality-causing activities and allow—but mandate compensation for—other externality-causing activities (admittedly almost any activity produces some level of externality), particularly distinguishing between activities that create value and non-value-creating wealth transfers, see ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 54–87 (1974).

10. See KENNETH S. ABRAHAM, *THE FORM AND FUNCTIONS OF TORT LAW: AN ANALYTICAL PRIMER ON CASES AND CONCEPTS* 14–20 (2d ed. 2002).

awards for attorney fees and litigation expenses.<sup>11</sup> Additionally, defendants' legal fees equaled approximately fifteen percent of damages awarded in tort suits.<sup>12</sup>

In the late Nineteenth Century, the Industrial Revolution gave rise to a new problem for tort law to address: mechanized accidents.<sup>13</sup> The economic and social implications of industrial accidents called into question the efficacy of tort law in an industrialized world.<sup>14</sup> The tort system's failure to adequately address industrial injuries caused legislatures to devise workers' compensation programs deemed to better meet society's needs.<sup>15</sup>

Mass torts are again calling into question the tort system's ability to combat vast economic and social problems. As Professor John Goldberg surmises, "[W]e have asked too much of [tort law]. . . . [It] is not well-suited to solve the large-scale social and political problems it is being asked to solve (if only by default)."<sup>16</sup>

### A. The Mandatory Class Action Approach to Mass Tort

The traditional tort law system is ill-equipped to handle cases related to mass-produced products.<sup>17</sup> Over twenty-five years ago, Professor David Rosenberg noted that mass exposure cases were arising with increasing frequency due to mass production.<sup>18</sup> The damages allegedly caused by any one mass-produced product and the costs associated with litigating claims related to such a product can reach hundreds of millions or even billions of dollars.<sup>19</sup> Individual mass tort adjudication is particularly problematic because proof of complex scientific and medical claims requires significant investment by plaintiffs whose fractional interests in their anticipated judgments create little incentive to litigate compared to the highly-concentrated incentive of mass tort defendants.<sup>20</sup> These costs can become prohibitively

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11. Rabin, *supra* note 1, at 2280 (citing JAMES S. KAKALIK & NICHOLAS M. PACE, COSTS AND COMPENSATION PAID IN TORT LITIGATION 68-74 (1986)).

12. *Id.*

13. John Goldberg, *Unloved: Tort in the Modern Legal Academy*, 55 VAND. L. REV. 1501, 1506 (2002).

14. *Id.* at 1507.

15. *Id.* at 1506-07.

16. *Id.* at 1518.

17. Although the author agrees that the American tort system is in need of reform, he does not necessarily agree with all of the views expressed in this section. Rather, this section serves to summarize the views of scholars favoring a move to a mandatory class action system.

18. See Rosenberg, *Causal Connection*, *supra* note 1, at 851-54.

19. See *id.*; see also David Rosenberg, *The Path of the Law After One Hundred Years: The Path Not Taken*, 110 HARV. L. REV. 1044, 1046 (1997) [hereinafter Rosenberg, *The Path Not Taken*] (noting the multi-billion dollar settlement in the silicone breast implant "spectacle").

20. See *supra* notes 3-6 and accompanying text.

expensive to the individual plaintiff due to the complexity of medical evidence and expert witness testimony: "The system's case-by-case mode of adjudication makes mass exposure litigation needlessly expensive by requiring separate and repeated determinations of various complex issues, such as those regarding causation, that are common to all the claims arising out of any single mass exposure event."<sup>21</sup> The Rand Corporation estimated that sixty-one percent of money transferred in asbestos cases is attributable to the transaction costs of litigation.<sup>22</sup> Class actions allow plaintiffs to share the costs of proving such claims, thus making litigation more efficient. Further, forcing plaintiffs to consolidate claims reduces the litigation expenses incurred by defendants, eliminates redundancies in litigation, avoids the risk of inconsistent judgments, and prevents plaintiffs from strategically gaming the system against defendants.

In addition to the crippling costs of individual litigation, the traditional tort system is ill-suited to mass tort cases involving complex scientific questions. Commenting on how the legal profession and academy has lived up to the ideas expressed by Justice Oliver Wendell Holmes, Jr., in *The Path of the Law*,<sup>23</sup> Professor Rosenberg noted:

To be sure, tort liability plays a useful role in cases in which the courts essentially enforce generally accepted scientific opinion, as they do in the asbestos context. But the spectacle of silicone breast implant plaintiffs asserting claims that were scientifically dubious but that nevertheless resulted in a multi-billion dollar settlement (while bankrupting a major pharmaceutical company) raises questions about the wisdom of allowing tort law to venture into areas of scientific debate and impose its traditional all-or-nothing judgments regardless of the degree of scientific uncertainty.<sup>24</sup>

A particular problem arises concerning the specific causation requirement.<sup>25</sup> One paradigm of mass tort cases involves product liability claims against firms that produced fungible pharmaceutical agents or products containing asbestos or silica.<sup>26</sup> When several firms introduce fungible products into the market that cause diseases with long latency periods, proof of which firm supplied the particular product that caused any individual plaintiff's particular harm is often a near-impossible hurdle that can frustrate the tort system's goal of optimal deterrence. The background risks typical of some diseases further

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21. Rosenberg, *Causal Connection*, *supra* note 1, at 900 (internal citations omitted); *see also* Rabin, *supra* note 1, at 2281 (questioning the institutional capacity of courts to make factual findings on complicated scientific and technological matters); Rosenberg, *The Path Not Taken*, *supra* note 19, at 1046 (questioning the institutional capacity of courts to make factual findings on complicated scientific and technological matters).

22. *See* Perino, *supra* note 5, at 94–95, 94 n.21.

23. 10 HARV. L. REV. 457 (1897).

24. Rosenberg, *The Path Not Taken*, *supra* note 19, at 1046.

25. *See generally* Rosenberg, *Causal Connection*, *supra* note 1.

26. *See id.* at 853.

complicate matters of proof and can lead to defendants being held liable for harms they did not cause.<sup>27</sup> In such cases, an alternative damages or liability award system, such as proportional liability or liability based on a market-share or a “contribution risk” basis may provide a more efficient means to achieve optimal deterrence while protecting defendants from exposure to liability based on uncertain science.<sup>28</sup>

Reform proponents argue the continued failure of the American legal system to utilize mandatory class actions (or some alternative adjudication mechanism) frustrates optimal deterrence and victim compensation because individual plaintiffs lack the incentives to adequately invest in separate litigation.<sup>29</sup> Professor Rosenberg advocates decoupling the determination of damage liability (the quantified harm caused by the mass tort defendant) from the distribution of damage awards (the amount paid to individual mass tort claimants).<sup>30</sup> Decoupling would serve the deterrence and compensation functions better than the current system, which conflates the two functions into a damage liability award that provides compensation.<sup>31</sup> Decoupling would (1) exploit economies of scale through aggregate, mandatory class actions; (2) serve the deterrence function through a trial stage that assesses the aggregate tortious harm caused by the defective product; and (3) serve the victim compensation function by establishing an insurance fund from the damage assessment, from which victims would be compensated according to severity of loss, as opposed to strength of legal claim.<sup>32</sup>

A major hurdle to a mandatory class action rule is the notion of individual claim autonomy, often manifested by plaintiff opt-out rights. Proponents argue that mandatory class actions are needed to overcome the collective action problems that cause individuals with

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27. See generally Rosenberg, *The Path Not Taken*, *supra* note 19, at 1047 (noting that some view judgments based on scientifically-erroneous findings favorably “as a means of transferring wealth from well-heeled defendant corporations to needy and helpless individual plaintiffs”).

28. See Rosenberg, *Causal Connection*, *supra* note 1, at 855–57; see also *Sindell v. Abbott Labs.*, 607 P.2d 924 (Cal. 1980) (adopting market share liability in DES class actions). It is important to note that not all products causing complications are defective, nor should manufacturers of non-defective products be required to pay compensation. Further, class actions are not appropriate for all alleged mass torts, particularly when the nature and form of injuries varies greatly or plaintiff-specific factors dominate.

29. See David Rosenberg, *Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss*, 88 VA. L. REV. 1871, 1871 (2002) [hereinafter Rosenberg, *Decoupling*].

30. See *id.* at 1871–77.

31. See *id.* at 1883–88.

32. See *id.* at 1876.

strong legal claims to opt out of class actions.<sup>33</sup> Under the current system, rational individuals with strong claims will opt out of the class, undermining economically efficient resolution of the mass tort.<sup>34</sup> Although prohibiting opt-out rights sounds offensive to the traditional notion of individual justice, legal rules are, and should be, designed ex ante to promote the best substantive outcomes under a rule of law. Because people do not know whether they will be tort victims or what the strength of their potential claims will be ex ante, rational actors will prefer a system that achieves the greatest total social welfare—one providing all individuals the best prospective outcome ex ante.

It is inherently cheaper to avoid an unreasonable risk—which by definition costs more than it benefits society—than to compensate an accident victim for damages arising from an unreasonable risk.<sup>35</sup> Therefore, a system that achieves optimal deterrence is in society's best interest. If mandatory class actions move our tort system toward more effective deterrence, forfeiting opt-out rights is a form of favorable mast-tying for all rational individuals. By contrast, the individual justice, "day in court" rationale supposes that individuals would rather bear greater risk in a system with suboptimal insurance in exchange for the ability to litigate their claims independently.<sup>36</sup>

Professor Michael Perino argues that in promoting the concept of individual autonomy, opt-out rights "frustrate the resolution of complex claims," thus undermining individual welfare and "not serv[ing] their intended purpose."<sup>37</sup> Perino contends opt-out rights often destabilize classes and facilitate collective action problems, do not always provide an adequate check against sweetheart deals, and motivate rent seeking by class members with strong legal claims.<sup>38</sup> Because the intended benefits of opt-out rights are largely illusory,

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33. Perino, *supra* note 5, at 85; see also David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561 (1987) (arguing that class actions better serve individual justice than individual adjudication).

34. For example, an individual with a sympathetic background or a strong case may opt out to pursue her chances of winning a blockbuster award. Meanwhile, individuals with less sympathetic backgrounds or weak cases (but who have still suffered damages) will be part of a weaker class without the benefit of the individuals with strong cases.

35. For the modern American tort law definition of reasonableness, see Judge Learned Hand's use of cost-benefit analysis to determine the confines of the duty of reasonableness. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) ("Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether  $B < PL$ .").

36. See Rosenberg, *Decoupling*, *supra* note 29, at 1891, 1908–09, 1913, 1915.

37. Perino, *supra* note 5, at 85; see also Rosenberg, *supra*, note 33 (arguing that class actions better serve individual justice than individual adjudication).

38. Perino, *supra* note 5, at 115–37.



Perino suggests opt-out rights should be severely limited or completely eliminated to overcome the collective action problem faced by mass tort plaintiffs and to allow successful aggregation of collective interests into an effective litigation class.<sup>39</sup>

## B. The Individual Autonomy Concern

### 1. *The "My Day in Court" Mentality*

Despite the apparent efficiency gains of mandatory class action litigation, many people remain steadfastly opposed to compelled mass adjudication because of the notion that everyone deserves their day in court. Importantly, the Supreme Court suggested, in dicta, that there is a Fifth Amendment (and supposedly Fourteenth Amendment) due process concern stemming from the "principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process," which serves "our deep-rooted historic tradition that everyone should have his own day in court."<sup>40</sup> Although the Court was not passing a normative judgment on the desirability of mandatory class actions, the due process hurdle cannot be overcome simply as a matter of convenience.<sup>41</sup> Constitutional rights cannot be brushed aside merely because they are out of favor.

While the Supreme Court has yet to definitively rule on the due process implications of mandatory class actions, there is reason to believe that, short of a constitutional amendment, a mandatory class action rule would be consistent with due process so long as parties' interests were sufficiently represented. Legislatures' responses to the Industrial Revolution's effects on the safety of workers caused similar

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39. *Id.* at 153–54. The intended benefits of opt-out rights include preventing class counsel from "selling out" the class for a large attorney fee, protecting high-stakes claimants from low-stakes claimants who water down the average recovery, and preserving traditional notions of individual justice. *Id.* at 105–07.

40. *Ortiz v. Fibreboard Corp.* 527 U.S. 815, 846 (1999) (quoting *Martin v. Wilkes*, 490 U.S. 755, 762 (1989)) (internal citations and quotation marks omitted).

41. Consider the Line Item Veto Act, which was a popular law intended to cut wasteful federal spending. The Supreme Court found this convenience inconsistent with the procedures laid out in the Presentment Clause. *See Clinton v. City of New York*, 524 U.S. 417 (1998) (holding Line Item Veto Act's cancellation provisions violate the procedural mechanisms required by the Constitution's Presentment Clause, art. I, § 7, cl. 2). David Resnick, in evaluating John Locke's conception of constitutionalism, recognized a difference between the effectiveness of a law at serving substantive purposes and that law's constitutionality. *See* David Resnick, *Rationality and the Two Treatises*, in *JOHN LOCKE'S TWO TREATISES OF GOVERNMENT* 82, 113 (Edward Harpham ed., 1992). Even a substantively useful law that serves constitutional goals is invalid if it is repugnant to the Constitution. *Id.*

due process concerns in the early twentieth century.<sup>42</sup> When confronted with a due process challenge to Arizona's workers' compensation program in 1919, the Supreme Court affirmed the legislative replacement of the common law tort system as consistent with the Fourteenth Amendment's Due Process Clause.<sup>43</sup> In a concurring opinion, Justice Oliver Wendell Holmes, Jr., allowed that supplanting the common law with a legislative compensation system that placed the burden of compensating injured employees on employers "seems . . . within constitutional bounds."<sup>44</sup>

Of course, living in a republic creates many situations in which people are bound by actions not within their direct control. While the legislature acts as the representative of the People, individual people do not get their day in court to fight the deprivation of property effected through a tax increase.<sup>45</sup> So long as the tax is passed by constitutional means, it has no constitutional defect.<sup>46</sup> Legislative acts that assign future rights and responsibilities have generally been found consistent with due process.<sup>47</sup>

Aside from the due process concerns of a wronged individual, a useful juxtaposition to control of civil liability for rights vindication is the criminal law. The prosecution of criminal cases, which seek deterrence of future crimes and punishment for past crimes, is controlled by the state. The corrective justice notion of rights vindication against a wrongdoer so strong in the civil context—indeed a victim can seek

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42. See generally *supra* note 15 and accompanying text.

43. See *Arizona Copper Co. v. Hammer*, 250 U.S. 400 (1919).

44. *Id.* at 433 (Holmes, J., concurring).

45. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974) (holding that citizen-taxpayers generally lack standing to litigate legitimate government actions they disagree with).

46. See, e.g., *Bi-Metallic Inv. Co. v. State Bd. of Equalization of Colo.*, 239 U.S. 441, 445 (1915) ("Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.").

47. See *Prentis v. Atl. Coast Line Co.*, 211 U.S. 210, 226 (1908) ("A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power."). For a discussion of the Due Process Clause's effects on legislative alteration of prospective rights, see PETER L. STRAUSS ET AL., *GELLHORN AND BYSE'S ADMINISTRATIVE LAW* 238–51 (10th ed. 2003).

civil penalties aside from the state's criminal prosecution<sup>48</sup>—does not exist in the criminal context. While state control of criminal prosecution flows from the legal construction that criminal behavior is an offense against the state, victims and their families routinely find justice in punishment administered by the state.<sup>49</sup> Yet, people readily accept that the state will prosecute crimes, leaving no “autonomy” to the victim. Contrasting the civil and criminal contexts reinforces that the substantive argument in favor of retaining individual tort claim autonomy is not based on any assessment of the best interests of the individual but on the ontological argument that individual claim autonomy is somehow essential to the nature of private law.<sup>50</sup>

## 2. *Law for Law's Sake*<sup>51</sup>

In 1995, Professor Ernest Weinrib laid out his defense of private law in *The Idea of Private Law*. To Professor Weinrib, liability in private law provides a form of morality.<sup>52</sup> Law should be seen as an independent, academic exercise focused on the value of its own process: “[P]rivate law is a self-understanding enterprise . . . .”<sup>53</sup> Professor Weinrib acknowledges the obvious criticism to his assertion that “the purpose of private law is to be private law”: His argument amounts to nothing more than a self-justifying, “hopelessly unilluminating tautology,” but he counters that life's greatest fulfillments, notably love, cannot be more meaningfully articulated than his justification of law.<sup>54</sup> He postulates, “Love is its own end. My contention is that, in this respect, private law is just like love.”<sup>55</sup>

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48. See, e.g., *Rufo v. Simpson*, 103 Cal. Rptr. 2d 492, 497 (Cal. Ct. App. 2001) (upholding O.J. Simpson's civil liability of over \$20 million in compensatory and punitive damages for the deaths of Nicole Brown Simpson and Ronald Lyle Goldman).

49. See, e.g., Walter Berns, Op-Ed., *Where Are the Death Penalty Critics Today?*, WALL ST. J., June 11, 2001, at A22 (“The death penalty was imposed on McVeigh not for utilitarian reasons but because justice required it . . . .”); Laurie P. Cohen, *Doing Justice: In Terrorism Trial, Death-Penalty Debate Blazes New Ground*, WALL ST. J., Mar. 20, 2002, at A1 (assessing the impact of September 11th terrorist attacks on victims' families and the families' support of death penalty); Editorial, *McVeigh's Politics*, WALL ST. J., June 12, 2001, at A22 (quoting President Bush's description of Timothy McVeigh's execution: “not vengeance, but justice”); Dave Wedge, *At Ground Zero, justice 'finally done'*, BOSTON HERALD (May 2, 2011), <http://www.bostonherald.com/news/regional/view.bg?articleid=1335003> (noting former New York City Mayor Rudy Giuliani's reaction to the death of Osama bin Laden: “I feel justice has finally been done”).

50. See WEINRIB, *supra* note 8, at 5 (“[T]he purpose of private law is to be private law.”).

51. *Law for Law's Sake* is the title of a book review by Robert Rabin on Ernest Weinrib's book, *THE IDEA OF PRIVATE LAW*. See Rabin, *supra* note 1.

52. See WEINRIB, *supra* note 8, at 2.

53. *Id.* at 15–16.

54. *Id.* at 5.

55. *Id.* at 6.

True, when asked what they want out of life, people may say “friends,” “family,” “love,” “wealth,” or “fame”; but these are desired because they are the means to a sense of happiness or fulfillment. Equating love to law ignores that form must serve function. Law is a useful means to serve desired societal functions, but a law is only as good as its consequences. Law itself is not happiness or fulfillment—except perhaps for those truly devoted to esoteric pursuits. While possessing great potential to facilitate happiness and fulfillment by serving other ends, law itself is not an end game. The justification of any law must be grounded in its utility. By transforming the means into the ends, Professor Weinrib provides a tautological defense that serves as the falsest of analogies.<sup>56</sup>

Even the self-justifying argument of love for love’s sake is misbegotten. The feeling of love that seems self-justifying is in reality the feeling of happiness and fulfillment that accompanies love.<sup>57</sup> Only when love is conceptualized as happiness or fulfillment is love its own reward. But, to state the obvious, law is not love; it is not a human experience or emotion. Law may provide a fulfilling philosophical pursuit for lawyers, as researching cancer may provide fulfillment to an oncologist in this sense; but the practice or execution of law or medicine must serve greater ends than the personal fulfillment of those who specialize in these disciplines. The medical community would not be justified in continuing a practice that harmed patients merely because it made doctors feel good. To the extent that medicine makes people’s lives better, it serves its purpose. Good health serves the human condition by allowing for fulfillment. Private law serves the human condition not as a direct means of fulfillment, but by providing an orderly system for resolving disputes.

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56. Taken to its extreme, any horrendous entity could be justified in this manner: Cancer is good because it is cancer; genocide is good because it is genocide.

57. The position that human fulfillment or betterment of the human condition is the highest principle to which law and other human endeavors should aspire is one that provides no inherent self-justification. This is what German philosopher Hans Kelsen termed a “grundnorm” (or, in English, a “basic norm”)—the self-justifying principle from which other norms descend. See generally HANS KELSEN, *GENERAL THEORY OF NORMS* (Michael Hartney trans., Oxford Univ. Press 1991) (1979). Grundnorms may be the will of God, the social contract, or “the Good.” *Id.*; see PLATO, *THE REPUBLIC* (R.E. Allen trans., Yale Univ. Press, 2006) (enunciating Plato’s theory of “the Good”). Philosopher Robert Nozick suggested that individual autonomy and individual rights may be important because we want people to be able to shape their lives meaningfully. See NOZICK, *supra* note 9, at 50. Although he admitted he had no great answer for why a meaningful life is worth preserving, protecting, or fostering, the concept of bettering the human condition serves as the underlying basis for most ends-motivated law—indeed, this is the underlying rationale for the feeling that motivates most people’s impulses as to why something is right or wrong. *Id.*

Responding to Professor Weinrib, Professor Robert Rabin asserts, "Law is of an entirely different order [than love]. No one has recourse to the law as an end in itself, rather than as a means to assert a protective claim."<sup>58</sup> Indeed, the tort system does not exist to provide a form of therapy between two human beings, it is a product of the government designed to serve external purposes.<sup>59</sup> To the extent civil law provides a feeling of justice distinct from its economic benefits, the value of that feeling can be weighed against the benefits that flow from a system that better serves the ends of optimal deterrence and victim compensation; however, it is doubtful that the emotional value derived from litigation would exceed the economic value of a more efficient legal system.<sup>60</sup>

Professor Weinrib favors the present form of private law because it provides a method for linking plaintiff to defendant through a system of correlative duties and rights, the latter of which being vindicated through the adjudicatory process.<sup>61</sup> Under this view, the primacy of private law is "the direct connection between the particular plaintiff and the particular defendant."<sup>62</sup> Professor Weinrib argues that adherence to legal formalism supports the Aristotelian notion of corrective justice, which fulfils the notion of Kantian right.<sup>63</sup> Essentially, law was devised to correct wrongs afflicted upon a certain notion of rights and should remain that way.

Although this notion may have been the backdrop against which the common law developed, critical exploration of why these rights arose or which practical effects stemming from this notion of corrective justice are important could reveal better ways to achieve these ends. Aristotle's system of corrective justice focuses on direct transfers from wrongdoer to injured—specifically focusing on the nature of the relationship between the wrongful act and the harm.<sup>64</sup> Professor Weinrib finds Aristotle's logic somewhat deficient but justifies his own theory of corrective justice as serving Immanuel Kant's notion of equality of individual autonomy through the law's mechanism of holding one person responsible for the impairment effects of his exercises of autonomy on others' autonomy.<sup>65</sup> If Aristotle developed his system

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58. Rabin, *supra* note 1, at 2270.

59. *See id.*

60. For a discussion of economic valuation techniques for "life and other nonmonetary benefits," see W. KIP VISCUSI ET AL., *ECONOMICS OF REGULATION AND ANTI-TRUST* 717–43 (4th ed. 2005). For the argument that no rational individual would pay ex ante for the right to a day in court and forgo a system with optimal deterrence and compensation, see Rosenberg, *Decoupling*, *supra* note 29, at 1915–16.

61. *See* WEINRIB, *supra* note 8, at 11, 28.

62. *Id.* at 10.

63. *See id.* at 18–21.

64. *See id.* at 56.

65. *See id.* at 57–58.

of corrective justice based on the relationship of a wrong to an injury and the circumstances under which a wealth transfer is appropriate to vindicate the wrong,<sup>66</sup> it is unclear why Professor Weinrib insists on retaining the traditional trial system to vindicate rights.<sup>67</sup> If Kantian self-determinism could be furthered more efficiently through a different set of legal mechanisms, why rigidly adhere to the current system? The Kantian reinterpretation of the three precepts of right—“to live honorably, to injure no one, and to give each person his due”<sup>68</sup>—are not exclusive of a system that promotes maximization of social welfare through optimal deterrence and victim compensation, and Professor Weinrib provides no reason why reaching these goals through an alternative mechanism is unacceptable. If these goals can be more effectively achieved through another form, the better form should prevail.<sup>69</sup>

Despite the frailty of the legal formalism presented by Professor Weinrib, formalism does serve an important function in fostering the rule of law and restraining arbitrary and abusive exercises of governmental power. The next Part defends formalism in its proper context in relation to functionalism.

### III. FORM AND FUNCTION: IN DEFENSE OF A CERTAIN TYPE OF FORMALISM

#### A. Rule-of-Law Formalism

A scene from Robert Bolt's *A Man for All Seasons* is frequently used to eloquently defend what I will refer to as “rule-of-law formalism.”<sup>70</sup> In the scene, Sir Thomas More refuses to arrest Richard Rich, who More is certain will later cause his demise.<sup>71</sup> Although More has the power to arrest Rich, More lacks legal authority to do so because

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66. See *id.* at 56–57.

67. See *id.* at 18–21.

68. *Id.* at 86 (discussing “Kant’s reinterpretation of the Roman jurist Ulpian’s three precepts of right”).

69. See *id.* at 18–21, 56–58 (Aristotle), 84–87 (Kant). For more thorough treatment of Aristotle and Kant, see generally *id.* at 56–113. See also Rabin, *supra* note 1, at 2265 (discussing Weinrib’s reliance on the Kantian notion of “self-determining agency” and free will). For an argument that the current tort system’s corrective justice components do not serve the modern functional rationales for tort law (victim compensation and deterrence) because harm is not always compensated and deterrence is merely a by-product of plaintiffs’ individual motivations, see *id.* at 2264.

70. See, e.g., Judge William H. Pryor Jr., U.S. Court of Appeals for the Eleventh Circuit, Keynote Address at the Federalist Society 2007 Annual Student Symposium (Feb. 24, 2007), at 0:06:07–0:08:33, available at <http://www.fed-soc.org/publications/detail/judge-pryor-address-event-audiovideo> (reading this scene from *A Man for All Seasons*).

71. See ROBERT BOLT, *A MAN FOR ALL SEASONS* 65 (Random House ed. 1962) (1960).

Rich has done nothing illegal.<sup>72</sup> More adheres to the law's formal requirements out of respect for the rule of law, which should restrain individuals from bending or discarding the law for their own benefit.<sup>73</sup> Another character, Roper, confronts More, asserting he would "cut down every law in England to [get after the Devil]," to which More replies:

Oh? And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast—man's laws, not God's—and if you cut them down—and you're just the man to do it—d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake.<sup>74</sup>

Disregarding the law to reach the "right" result undermines the rule of law. Law exists to prevent the arbitrary exercise of governmental power—the enforcement of any judicial decision, criminal or civil, being an exercise of governmental power. There is value in a predictable system of law that allows people to know or reasonably predict the legal consequences of their actions. The inherent fairness of a predictable legal system fosters social harmony by giving people incentive to consent to governmental power, which in turn is restrained from arbitrary application. To change the law or the execution of the law after the fact punishes behavior that one had no reason to believe was wrong at the time.

There is an important distinction between rule-of-law formalism and the formalism that insists on retaining a rule merely because it is the rule. Rule-of-law formalism allows laws to be changed pursuant to accepted procedures, whether by legislative act or common law judicial decision making.<sup>75</sup> The argument that people must have a *particular* formal mechanism to assert tort claims is quite different than the argument that the legal system should provide *some* formal, predictable means of adjudicating disputes. While formalism promotes individual justice and other system-related benefits, there is no need to tie ourselves to a particular form that is no longer the optimal way to reach our goals. Whenever a government changes a law, expectations of future rights must also change. If the government changed the tort system to mandate class actions in certain contexts, the conception of one's right to bring suit would change to a right to participate in a class. Although this change may be initially troubling, such a change is not that different than when a legislature alters substantive rules of conduct.

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72. *Id.*

73. *Id.* at 65–66.

74. *Id.* at 66.

75. Admittedly, retroactive application of new common law rules is troubling in this respect, but it is far more common for a court to apply an established law than to adopt a new one.

Delivering the Oliver Wendell Holmes, Jr., Lecture at Harvard University in 1989, Justice Antonin Scalia defended formalism as a restraint on judicial power.<sup>76</sup> Justice Scalia provided the examples of King Louis IX of France and King Solomon, both of whom resolved disputes between subjects without a formal set of laws.<sup>77</sup> They produced results that were considered fair.<sup>78</sup> Justice Scalia acknowledged:

The advantages of the discretion-conferring approach are obvious. All generalizations . . . are to some degree invalid, and hence every rule of law has a few corners that do not quite fit. It follows that perfect justice can only be achieved if courts are unconstrained by such imperfect generalizations.<sup>79</sup>

In addition to reaching the right result—from any political standpoint—Justice Scalia argued it is important that the law provides the appearance of equal treatment.<sup>80</sup> The appearance of equal treatment confers a sense of justice over judicial decisions, which grants respect to the legal system.<sup>81</sup> Stated another way, in order to foster the rule of law, people must believe that the law is just.<sup>82</sup> This formalism differs from Professor Weinrib's in that it does not endorse any particular mode of adjudication or substantive law, only that courts act predictably, applying established law.<sup>83</sup>

Foreknowledge of the law is important because it creates predictability. Justice requires that people have the ability to know what the law is before they act.<sup>84</sup> Acknowledging that the formulation of a new common law rule results in retroactive application of new standards, Justice Scalia endorsed the announcement of clear rules to restrict future judicial discretion and promote future predictability.<sup>85</sup> When judges adopt a rule for future decisions, they bind themselves and lower judges in the system to follow that rule, even if their policy preferences call for different results.<sup>86</sup> Further, Justice Scalia prefers rules to balancing tests because of the consequences of the latter on the system of justice: "equality of treatment is difficult to demonstrate[;] . . . predictability is destroyed; judicial arbitrariness is facilitated; judicial courage is impaired."<sup>87</sup>

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76. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

77. *Id.* at 1175–76.

78. See *id.*

79. *Id.* at 1177.

80. *Id.* at 1178.

81. See *id.*

82. See *id.*

83. For comparison, see WEINRIB, *supra* note 8.

84. See *id.* at 1179.

85. *Id.*

86. See *id.* at 1177.

87. *Id.* at 1182.



Moreover, Justice Scalia noted that judges in our system at times have to enforce laws that serve larger principles in cases where more immediate concerns would dictate the opposite result.<sup>88</sup> The immediate concern is always more appealing in the instant case, thus undermining the broader, more important goals of the legal system.<sup>89</sup> Therefore, argued Scalia, justice is served if judges, sometimes “frail men and women, . . . can stand behind the solid shield of a firm, clear principle enunciated in earlier cases.”<sup>90</sup>

When judicial decision-making is not transparent or appears to be based on judges’ personal opinions on what is right or wrong, it may just as easily appear that judges are making decisions to achieve desired results or side with favored parties, rather than following the law to which the parties believed they were bound. This would be troubling for a defendant company sitting before a pro-plaintiff judge, an individual plaintiff sitting before a pro-business judge, or a person of a disfavored race sitting before a racist judge. If judges were angels, whose only interest in the outcome were justice, allowing wide-ranging judicial discretion would not be cause for alarm; but alas, judges are mere mortals, limited by human imperfection.<sup>91</sup> When rules are clear *ex ante* and results are predictable, acceptance of the rule of law is promoted. If the rules do not reach the “right” results because the rules are bad, the rules should be changed by the proper mechanisms to reach the right results. Abandoning the rule of law to reach the “right” result harms the larger system, which depends on stability and predictability.

## B. Form in the Service of Function

Rule-of-law formalism allows people to know *ex ante* how their actions will be treated *ex post*. Predictability in this sense is important in promoting deterrence because without foreknowledge of how actions will be treated, people and firms cannot optimize their risk profiles.<sup>92</sup> If society decides that a certain behavior will create an obligation to provide compensation for harms inflicted, rational firms will only engage in that behavior to the extent its benefits exceed its costs,

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88. *See id.* at 1180.

89. *See id.* Consider, for example, denying “insurance” recovery to an uninsured person. Denying a claim to a person in need may make some people feel sad, but allowing *ex post* insurance coverage would frustrate insurance markets and the risk-spreading function of insurance.

90. *Id.* at 1180.

91. “But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary.” *THE FEDERALIST* No. 51, at 290 (James Madison) (Clinton Rossiter ed., 1961).

92. This does not require explicit declaration that certain behavior will create liability. Foreknowledge of a negligence standard based on cost-benefit analysis or a strict liability regime provides sufficient predictability.

both internal and external. As such, the formal structure of a tort regime can be designed to reach optimal deterrence.

From the *ex ante* perspective, rational individuals formulating rules of conduct would likely design a system calculated to optimize results for society as a whole; however, from the *ex post* perspective, individuals tend to favor rules that benefit them individually, rather than rules best for society as a whole. An optimal system must bind people to rules of conduct before they act or are affected by others' actions. In the mass tort context, people who prefer an individual right to litigate claims due to individual justice concerns or self-interest in pursuing their superior legal claims are acting in a manner ultimately to the detriment of the system as a whole.

Of course, in practice some people do not favor optimal *ex ante* rules because people are not always rational—indeed no one lives an entirely rational life. If rationality were the norm, lotteries would not exist. Yet, there are obvious differences between gambling and civil litigation. Most relevant here, occasional, modest gambling may be a rational form of entertainment, but opting for a suboptimal tort regime is not. While many people may consider lotteries a tax on those who are bad at math, there are likely others who regularly gamble in moderation for entertainment. Although most forms of gambling are not wise economic choices—the success of skilled poker players being an obvious exception—few indulgences are. Luxury automobiles, five-star restaurants, and designer clothing are not as practical as their less expensive counterparts, but in free societies people have discretion as to how they spend their money. Indeed, if people could not spend their money in ways that brought them pleasure, there would be little motivation for people to produce beyond subsistence needs. The desire for leisure and luxury drives people to work and produce, which creates wealth. Moreover, the industries that cater to luxury goods and services markets further add to economic growth. Yet, the irrationality in each of our lives does not justify societal rules that produce suboptimal results.

The tort system must serve different ends. Lawsuits do not exist for personal amusement or indulgence. Although inefficient dispute resolution and adjudication may generate attorney's fees, these are transaction costs on a system that serves larger societal goals. Society should not be deprived of optimal deterrence resulting from an economically efficient system so that the state's mechanisms can instead be employed to serve individuals' corrective justice desires.

The relation of form and function is important to any democratic government. Formality may promote stability and consent to the rule of law, but form must be continuously evaluated and revised to serve function. The next Part explores John Locke's political philosophy

and analyzes its implications for the interaction of form and function in government, particularly regarding American tort law.

#### IV. JOHN LOCKE ON FORM AND FUNCTION

##### A. Locke in America

The political writings of John Locke, particularly *The Second Treatise of Government*, had tremendous influence on the political philosophy of America's Founding Fathers.<sup>93</sup> Locke's political philosophy provided the intellectual justification for the American Revolution, and his notions of individual rights, economic freedom, and property have been largely influential in the Western world.<sup>94</sup> Locke argued that betrayal of trust by the government—when the government acts to undermine the very reasons for its existence—frees the People from their duty of obedience to the commonwealth; the People revert back to their natural state and have the power to form a new government.<sup>95</sup> This power of revolution is akin to a reset button always reserved by the People when the government becomes abusive of the ends for which it was established.<sup>96</sup>

America's Declaration of Independence echoed Locke by pronouncing "Governments are instituted among Men, deriving their just powers from the consent of the governed."<sup>97</sup> Further, the Declaration of Independence justified Americans' rebellion on "a long train of abuses," the same phrase Locke used to argue that revolution should not take place for ordinary governmental malfeasance or negligence, but only for continual, systematic abuses.<sup>98</sup> Locke's "trilogy of life, liberty, and property" was altered by Thomas Jefferson in the Declaration of Independence ("life, liberty, and the pursuit of happiness") to exclude property.<sup>99</sup> The Fifth and Fourteenth Amendments would later invoke the Lockean trilogy, including property.<sup>100</sup>

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93. See *infra*, section IV.A.

94. See Paul E. Sigmund, *Introduction* to THE SELECTED POLITICAL WRITINGS OF JOHN LOCKE xi (Paul E. Sigmund ed., Norton 2005) [hereinafter Sigmund, *Introduction*]. For Locke's discussion of the dissolution of government, see JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT, *reprinted in* THE SELECTED POLITICAL WRITINGS OF JOHN LOCKE 110–19 (Paul E. Sigmund ed., Norton 2005) (1689) [hereinafter, LOCKE, SECOND TREATISE].

95. See LOCKE, SECOND TREATISE, *supra* note 94, at 114.

96. *Id.*

97. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); see Paul E. Sigmund, *Consent and Representation: Genuine or Fictitious?*, in LOCKE, SECOND TREATISE, *supra* note 94, at 343.

98. THE DECLARATION OF INDEPENDENCE para. 2; see LOCKE, SECOND TREATISE, *supra* note 94, at 116.

99. THE DECLARATION OF INDEPENDENCE para. 2. Paul E. Sigmund, *Locke in America*, in THE SELECTED POLITICAL WRITINGS OF JOHN LOCKE, *supra* note 94, at 110–19.

100. U.S. CONST. amends. V, XIV.

Locke's influence on political philosophy, the American Revolution, and America's founding documents make his work continually relevant in evaluating the nature of modern American political thought. Locke scholar Paul Sigmund maintains, "[f]ollowing the examples of Thomas Jefferson and the Founding Fathers, Americans have always seen Locke as the great defender of the rights of the individual."<sup>101</sup>

As this Article shows, the Lockean-Jeffersonian notion of individualism does not call for rigid adherence to a specific system of securing rights. Both Locke and Jefferson shared the belief that the meaning of a right could be changed by society.<sup>102</sup> Although Jefferson and Locke were in accord that "Governments long established should not be changed for light and transient causes," they both believed laws should change to best serve the rights governments are established to protect.<sup>103</sup>

## B. State-of-Nature Theory

### 1. *Why a State of Nature?*<sup>104</sup>

The idea of people living in a state of nature—without any governmental organization—may seem so artificial or so far removed from modern society that it is unworthy of consideration. Countering this view, philosopher Robert Nozick suggested that even if state-of-nature theory incorrectly explains how the present state of government arose, it is useful in explaining why legal institutions, rights, and duties are situated as they are.<sup>105</sup> Further, imagining ourselves free from our current model of government allows us to ask what kind of government we would design if starting fresh today and whether institutions currently in place still serve a useful end.

### 2. *Lockean Hierarchy of Law*

Before discussing Locke's state of nature and the social contract, an explanation of Locke's underlying hierarchy of laws is needed to understand the influences on his categorizations of law, particularly between natural and human law. Locke divided law, broadly construed, into a four-tiered hierarchy.<sup>106</sup> Divine or natural law is on top

101. Paul E. Sigmund, *Lockean Individualism: Atomistic or Social?*, in *THE SELECTED POLITICAL WRITINGS OF JOHN LOCKE*, *supra* note 94, at 333.

102. Sigmund, *supra* note 101, at 387.

103. *THE DECLARATION OF INDEPENDENCE* para. 2 (U.S. 1776); see *THE DECLARATION OF INDEPENDENCE* para. 3 (indicting King George III for interference with the legislative power of the Colonies).

104. The title for this sub-section was inspired by the opening chapter of Robert Nozick's *Anarchy, State, and Utopia*, entitled *Why State-of-Nature Theory?*.

105. See NOZICK, *supra* note 9, at 7–9.

106. See JOHN LOCKE, *SECOND TRACT ON GOVERNMENT*, reprinted in *LOCKE: POLITICAL ESSAYS* 63 (Mark Goldie ed., Cambridge Univ. Press 1997) (1662).

of this hierarchy, followed by human (or political) law, the law of charity, and finally monastic law.<sup>107</sup>

Divine law is that delivered by God. Moving down this hierarchy, all forms of law below divine law, including human law, “are indifferent by nature and their use is free,” meaning that matters not of God’s concern are free to be determined by humans.<sup>108</sup> The second tier, human law, “is that which is enacted by anyone maintaining law and command over others.”<sup>109</sup> This is the tier of law in Locke’s schema that fits our modern conception of law. The third tier, the law of charity, obligates a person to the aid of “some equal or even inferior fellow Christian.”<sup>110</sup> The lowest rank of law in Locke’s hierarchy is monastic law, which consists of the dictates of one’s conscious and mind:

For it is not enough that a thing may be indifferent in its own nature unless we are convinced that it is so. . . . Thus our liberty in indifferent things is so insecure and so bound up with the opinion of everyone else that it may be taken as certain that we do indeed lack the liberty which we think we lack.<sup>111</sup>

Despite his strong faith, Locke argued for broad government power over all things indifferent to the will of God. He would even have cast trivial aspects of divine worship within the power of the sovereign: “[it] follow[s] with perfect justice that indifferent things, even those regarding divine worship, must be subjected to governmental power.”<sup>112</sup> Although the laws of God are superior to all other laws and eternal in form, the laws of man must change to reflect society. Locke explained: “to have exactly the same constitution would not always be an advantage to a people.”<sup>113</sup> As such, Locke contended that God allows human magistrates to rule over matters indifferent to divine law.<sup>114</sup> These magistrates utilize human law to dictate “which [human behaviors], as occasion should demand, could be commanded or prohibited, and by the wise regulation of which the welfare of the commonwealth could be provided for.”<sup>115</sup> While recognizing the eternal and superior nature of God’s law, Locke saw that government should alter human law to fit the needs of the time.<sup>116</sup> The formal

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107. *Id.*

108. *Id.* Indifferent things are those “which are morally neither good nor evil,” and “all the things that are indifferent so far as a higher law is concerned are the object and matter of a lower” law. *Id.* at 62, 67.

109. *Id.* at 63.

110. *Id.*

111. *Id.* at 65. Using the Lockean hierarchy, an irrational obsession with individual claim autonomy or corrective justice could be attributed to an individual’s monastic law—a feeling for the way things ought to be, rather than a requirement of legitimate government.

112. LOCKE, *supra* note 106, at 69.

113. *Id.* at 64.

114. *Id.*

115. *Id.*

116. *See id.*

modes prescribed and the actions proscribed by the sovereign should change to meet the functional demands of society. Locke explicitly rejected the view that formalism should be maintained for the mere sake of formalism.<sup>117</sup>

### 3. *What Is the State of Nature? What Is Natural Law?*

The common Lockean notion of the sovereign deriving its power from the governed through a social contract was laid out by Locke in his *Second Tract on Government* (*Second Tract*) as one of three scenarios Locke believed people could use to describe the means by which a commonwealth comes into being.<sup>118</sup> The first school of thought is that human beings are born slaves.<sup>119</sup> Being slaves to the state, people had no power to relinquish to the state, as their power already laid with the sovereign at birth.<sup>120</sup> The second school asserts that men are born free, with all possessing equal power.<sup>121</sup> A commonwealth could not exist without a transfer of power because no government could exist if each person remained completely free and possessed unrestrained liberty.<sup>122</sup> According to the second school, governments form when people give up liberty in exchange for the order provided by a commonwealth.<sup>123</sup> The third school, which Locke said others had not hypothesized, maintains that power comes from God, and through the people, God invests power in a sovereign.<sup>124</sup> In the *Second Tract*, Locke expressed indifference as to which was the actual route by which the sovereign attained its power.<sup>125</sup>

In Locke's state of nature, the second of the above schools of thought, humans exist in the absence of government—each being their own sovereign.<sup>126</sup> Each person is equally free to reign over herself and her possessions.<sup>127</sup> No person's rights of freedom are superior to another's in this regard.<sup>128</sup> Ruth Grant described the state of nature as the relationship of people who "have between them no legitimate superiority or subjection, no political authority, who remain in their natural relation as free and equal to one another."<sup>129</sup> Despite

117. See LOCKE, *SECOND TREATISE*, *supra* note 94, at 57–58, 86.

118. See LOCKE, *supra* note 106, at 69–71.

119. See *id.* at 69–70.

120. *Id.*

121. *Id.*

122. *Id.*

123. See *id.* at 70.

124. See *id.*

125. See *id.* at 69–71.

126. See LOCKE, *SECOND TREATISE*, *supra* note 94, at 18.

127. See *id.*

128. See *id.*

129. Ruth Grant, *Locke's Political Anthropology and Lockean Individualism*, 50 J. POL. 42 (1988), reprinted in *THE SELECTED POLITICAL WRITINGS OF JOHN LOCKE*, *supra* note 94, at 339–40.

the lack of legitimate political authority to bind one's actions, Locke's state of nature is governed by a natural law that makes it wrong for a person to destroy herself or her possessions or do harm to another's life or property, except for in cases of self-defense or punishment.<sup>130</sup> There exists a distinct right "of taking reparation, which belongs only to the injured party."<sup>131</sup> When seeking reparation, others who find it just may aid the injured party in recovering from the injuring party.<sup>132</sup> Locke maintained "[t]hat he who has suffered the damage has a right to demand in his own name, and he alone can remit: the damnified person has this power of appropriating to himself the goods or service of the offender, by right of self-preservation."<sup>133</sup>

Despite natural law's right of restitution for transgressions, the remedy is not ideal because, each man being his own sovereign, no one source of power is superior to any other.<sup>134</sup> Natural law's dictates of good moral behavior are ineffective at providing security because some people are either ignorant of these laws or choose to violate them for personal gain. Without a commonwealth and human law, individuals would have trouble vindicating their rights against those with more strength, resources, or allies. Further, without a concept of finality to disputes, the parties may continue fighting indefinitely to redress a wrong much smaller than the damage done trying to rectify it.<sup>135</sup>

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130. See LOCKE, *SECOND TREATISE*, *supra* note 94, at 19.

131. *Id.* at 21.

132. *Id.*

133. *Id.*

134. See *id.* at 19–20.

135. See NOZICK, *supra* note 9, at 10–12. Locke's notion of natural law is similar to the modern concept of "human rights" in that neither of these sources of "law" are actually the law of any state; rather, they represent notions of morality that their professors believe states should aspire to promote and enforce. See generally Joseph M. de Torre, *Human Rights, Natural Law, and Thomas Aquinas*, VI CATHOLIC SOC. SCI. REV. 187, 200–02 (2001) (discussing historical attempts to study human rights in the context of natural law, incorporate human rights into substantive law, and frame human rights as the aspiration of substantive law). In this vein, human rights are a modern form of natural law, their basis being the proposition that human beings (should) have certain inalienable rights. The deficiency in both natural law and human rights is that without state recognition or enforcement as a corollary to the enforcement of some other right—a state that criminalizes murder would also defend the human right to be free from murder—these are not cognizable as we think of rights in positive law systems. See generally *id.* Amorphous ideas of human rights are best understood as aspirational goals or common ideals on the proper treatment and dignity of human beings. See generally *id.* This appears to be the practical thrust of Locke's natural law and his justification for the commonwealth.

#### 4. *Why Choose a Commonwealth?*

*I no sooner perceived myself in the world but I found myself in a storm, which hath lasted almost hitherto . . .*

—John Locke<sup>136</sup>

*[G]eneral freedom is but a general bondage . . .*

—John Locke<sup>137</sup>

The chaos inherent in the state of nature drives people to give up their freedom for majority rule by a community in order to protect their persons and their property.<sup>138</sup> While the state of nature provides the greatest freedom, people choose to give up this freedom because “the enjoyment of it is very uncertain, and constantly exposed to the invasion of others.”<sup>139</sup> In the state of nature there is not “an established, settled, known law, received and allowed by common consent to be the standard of right and wrong, and the common measure to decide all controversies between them.”<sup>140</sup>

In abandoning the state of nature for the protections of the commonwealth, Locke believed people would choose a government that maintained optimal freedom.<sup>141</sup> Locke’s ideal of optimal freedom under government requires governmental protection from others through legislatively enacted law and rule-of-law formalism, which allows people to act with foreknowledge of the standards to which they will be held:

[F]reedom of men under government is, to have a standing rule to live by, common to everyone of that society, and made by the legislative power erected in it; a liberty to follow my own will in all things, where the rule prescribes not; and not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man: as freedom of nature is, to be under no other restraint but the law of nature.<sup>142</sup>

Rational citizens desire formally declared laws under which to live. Without formalism, the law may be arbitrarily enforced in a way that does not protect life and property.<sup>143</sup> For the same reasons, formalism is desirable in setting the rules of engagement for legislative action and constraining judicial decision making.<sup>144</sup> It enhances one’s freedom to know *ex ante* the rules under which she will be governed. In

136. John Locke, *FIRST TRACT ON GOVERNMENT*, reprinted in *LOCKE: POLITICAL ESSAYS*, *supra* note 106, at 7.

137. *Id.*

138. See *LOCKE*, *SECOND TREATISE*, *supra* note 94, at 58–59.

139. *Id.* at 72.

140. *Id.*

141. *Id.*

142. *Id.* at 27.

143. See *id.* at 77.

144. For a discussion of the importance of rule-of-law formalism to foster predictability and restrain arbitrary governmental power, see *supra* section III.A.



Locke's time, there was great fear that the sovereign would abuse the criminal law, particularly to prosecute people for their religious or political beliefs—a fear that spurred early Americans to adopt certain provisions of the Bill of Rights.<sup>145</sup> Equal application of law to all, including the lawmaker, promotes a system of law that benefits society as a whole. Without formal equality in the application of laws, one who is out of favor with the sovereign may be arbitrarily punished.<sup>146</sup> Rule of law requires predictable, uniform application of a set of formal laws.<sup>147</sup> People, regardless of social standing, should be able to structure their actions to avoid running afoul of the law.<sup>148</sup> In modern times, rule-of-law formalism is desirable because, among other reasons, it can prevent arbitrary execution of the law based upon a person's race or social status.

### 5. *Locke's Notion of Property*

Locke's theory of property rights is consistent with reform of mass tort litigation rules. Locke's conception of property begins with the notion that each person has a right of property in her person.<sup>149</sup> One's labor is also her own, and by fusing her labor with objects of nature, she gains rights over those objects.<sup>150</sup> This justifies excluding others from claiming property rights in those objects, so long as there is enough left of common rights for others.<sup>151</sup> Locke denied the sovereign the power to arbitrarily take property from individuals for its own benefit, but allowed that the sovereign "may have power to make laws for the regulating of property between the subjects one amongst

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145. Consider that Locke went into exile from 1683–1689 because of his political activities and published the *Two Treatises of Government* anonymously, in part due to fear that the *Second Treatise's* justification of armed revolution could have subjected him to imprisonment or execution. See Sigmund, *Introduction*, *supra* note 94, at xviii–xix. Compare THE DECLARATION OF INDEPENDENCE para. 3 (U.S. 1776) (listing grievances against King George III, including subjecting colonists to foreign jurisdictions, deprivation of trial by jury, controlling tenure and pay of judges, and trying colonists "for pretended offences"), with U.S. CONST. art. III, § 1 (protecting the tenure and pay of judges), art. III, § 3 (defining the crime of treason and requirements for prosecution), amend. I (prohibiting Congress from establishing religion and protecting "the free exercise thereof"), amend. VI (securing rights of criminal defendants "to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation").

146. See LOCKE, *SECOND TREATISE*, *supra* note 94, at 27.

147. *Id.*

148. See Resnick, *supra* note 41, at 112–13 (citing *SECOND TREATISE*, *supra* note 87, at § 142).

149. See LOCKE, *SECOND TREATISE*, *supra* note 94, at 28–29.

150. *Id.*

151. See *id.*

another.”<sup>152</sup> Although the government may only take property by consent, taxation is legitimate if consented to either directly by the individual or indirectly through elected representatives.<sup>153</sup> Under this formulation of property rights, Locke would likely view any legislative reformulation of the tort system to further the common good as within the commonwealth’s power of property regulation.

Scholars have hotly debated the implications of Lockean property rights on modern governments. John Simmons reads Locke as advocating a minimalist state designed to protect individual rights, particularly “their ‘lives, liberties, and fortunes.’”<sup>154</sup> Meanwhile, James Tully reads Locke in a more communitarian light and argues that Locke’s conception of property requires people to submit themselves to the commonwealth and relinquish their property rights along with their power.<sup>155</sup> Under Tully’s view, property from the state of the nature is redefined by the community, making it community property.<sup>156</sup>

Jeremy Waldron counters Tully’s assessment of Locke’s treatment of governmental claims on property by arguing Locke distinguished between the regulation and confiscation of property.<sup>157</sup> This view allows the government to affect property rights through the exercise of governmental power but not to confiscate and redistribute property.<sup>158</sup> This view is, of course, question begging, as at a certain point it becomes difficult to meaningfully distinguish between taking and regulation. Waldron’s ultimate assessment is that government may regulate personal actions and property use through legitimate laws; legitimacy being predicated upon some form of consent.<sup>159</sup> Of course, Locke allowed for consent through legislative action, which renders the condition of consent a nullity, so long as the appropriate processes and procedures are followed.<sup>160</sup> If Locke allowed consent to effect a valid taking, and consent can be given by the government on behalf of the people, it is hard to imagine when a taking would lack consent.<sup>161</sup>

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152. *Id.* at 79; *see id.* at 78–79.

153. *See id.*

154. A. John Simmons, *ON THE EDGE OF ANARCHY: LOCKE, CONSENT, AND THE LIMITS OF SOCIETY* (Princeton Univ. Press 1993), *reprinted in* THE SELECTED POLITICAL WRITINGS OF JOHN LOCKE, *supra* note 94, at 344–45.

155. James Tully, *A DISCOURSE ON PROPERTY: JOHN LOCKE AND HIS ADVERSARIES* (Cambridge Univ. Press 1980), *reprinted in* THE SELECTED POLITICAL WRITINGS OF JOHN LOCKE, *supra* note 94, at 325, 328–29 (quoting LOCKE, *SECOND TREATISE*, *supra* note 94, § 137).

156. *Id.*

157. *See* Jeremy Waldron, *Locke, Tully and the Regulation of Property*, 32 *POL. STUD.* 98 (1984), *reprinted in* THE SELECTED POLITICAL WRITINGS OF JOHN LOCKE, *supra* note 94, at 330–32.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

Perhaps Waldron's larger point is that the commonwealth was formed to preserve people's claims to property in the state of nature. Although entering the commonwealth necessarily affects those rights in small degrees, people did not leave the state of nature so the commonwealth could redistribute property amongst the people.<sup>162</sup> That is, Locke saw government regulation of property as a parallel to government regulation of the individual—the government could exercise power over the individual, but only to the extent doing so would increase the individual's well-being.<sup>163</sup> Ultimately, any distinction between regulation and confiscation is a matter of degree rather than form.<sup>164</sup>

Waldron's critique of Tully turns on Locke's notion of majority consent.<sup>165</sup> If each individual were free to reject any law he chose, no person would consent to a law he believed caused more harm than good.<sup>166</sup> Individuals would enter the commonwealth only to the extent they predicted a net gain.<sup>167</sup> Commonwealths do not, however, allow individuals to opt in and out on a piecemeal basis. In a commonwealth, people are bound by the rule of the majority, subject to any institutionalized individual protections built into the constitution. Those with greater property holdings may be subjected to laws that regulate or redistribute property at a level above their preferences. Due to the lack of protection in the state of nature, people nevertheless choose to give up their complete freedom and subject themselves to majority rule. For, in a complete state of anarchy—more consistent with Thomas Hobbes's state of nature than Locke's—property rights would be nearly worthless.<sup>168</sup>

Once part of the commonwealth, all are equally subject to majority rule. Majority rule, then, allows the commonwealth to subject property to levels of regulation greater than would be desired by those who favor protection of individual rights over wealth redistribution. Although Locke's political views are consistent with a limited state that protects individual property rights and allows individuals to accumu-

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162. See LOCKE, *SECOND TREATISE*, *supra* note 94, at 77 (arguing that man would not leave the state of nature to subject himself to completely arbitrary power, as this would be worse than the state of nature and something no rational being would accept).

163. *Id.*

164. See Waldron, *supra* note 157, at 330–32 (citing LOCKE, *SECOND TREATISE*, *supra* note 94, at 78–79).

165. *Id.*

166. *Id.*

167. *Id.*

168. See generally THOMAS HOBBS, *LEVIATHAN* (G.A.J. Rogers & Karl Schuhmann eds., Bristol: Thoemmes Continuum 2003) (1651); Paul E. Sigmund, *Locke as Hobbesian Hedonist*, in *THE SELECTED POLITICAL WRITINGS OF JOHN LOCKE*, *supra* note 94, at 273 (rejecting Leo Strauss's contentions that Locke was a modified Hobbes and that Locke viewed "the state of nature as a state of war").

late wealth,<sup>169</sup> his conceptualization of the state of nature and the nature of government does not compel the classical liberal model of ideal government. Tully and Waldron clash over Locke's notion of property; but ultimately, any firm distinction between regulation and redistribution is hollow. Tully and Waldron's true conflict is whether Locke viewed property more consistently with the classical liberal model of a state that protects individual rights or the socialist model that redistributes wealth.<sup>170</sup>

#### 6. *The Social Contract: Bound by the Will of the Majority*

Upon entering a commonwealth, the social contract binds people to the will of the majority. Majority rule is necessary because if individuals were to retain the right to break free of the commonwealth, the social contract would be meaningless and the state of nature would endure.<sup>171</sup> Unanimous consent is impossible to attain in virtually all matters, and requiring universal agreement on matters of any importance would cripple the commonwealth.<sup>172</sup> The commonwealth's survival requires majority rule in some form.

The concept of majority rule is applicable to the mass tort context. As a member of a commonwealth, an individual necessarily gives up certain freedoms so that the commonwealth can serve societal interests. If one of those interests is effective mass tort resolution, forfeiting the right of individual claim autonomy may be necessary. In the class action context, opt-out rights undermine the ability of the class to litigate as a whole, thus crippling the class. For plaintiff classes to function effectively, all members must be bound by majority will. As with forming the commonwealth, this requires individuals to give up a certain form of autonomy *ex ante* to assure the best anticipated results for all *ex post*, thus benefitting each individual's prospective situation.

### C. Lockean Rationality: Form in the Service of Function

Although Locke considered God's natural law permanent, he strongly advocated that human law be a product of rational inquiry, changing over time to meet the needs of society.<sup>173</sup> This preference for

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169. See LOCKE, SECOND TREATISE, *supra* note 94, at 30 (noting that man has a right to "[a]s much as anyone can make use of to any advantage of life before it spoils, so much he may by his labour fix a property in: whatever is beyond this, is more than his share, and belongs to others").

170. Both of which differ from the economic ideal of a state that sets rules to promote economic efficiency.

171. See LOCKE, SECOND TREATISE, *supra* note 94, at 59.

172. See *id.*

173. See *id.* at 57–58.

rationality and progress is evident from Locke's justification for replacing a monarchy with a representative government:

[W]hen time, giving authority, and (as some men would persuade us) sacredness to customs, which the negligent and unforeseeing innocence of the first ages began, had brought in successors of another stamp; the people finding their properties not secure under the government as then it was (whereas government has no other end but the preservation of property), could never be safe nor at rest, nor think themselves in civil society, till the legislature was placed in collective bodies of men . . . .<sup>174</sup>

According to this philosophy, a representative legislature, as a superior form of government, is the proper successor to a monarchy.<sup>175</sup>

Over time, customs develop reverence in spite of their defects merely because of their age, but people are wise to enact reform to improve government and meet modern needs.<sup>176</sup> Monarchy was an improvement over anarchy, tribalism, and feudalism that served a purpose until a sufficient number of people became sufficiently educated to demand the ruling class be expanded. Locke argued that representative government is preferable to monarchy because greater freedom is attained when no person is superior to the law.<sup>177</sup> When members of the legislature are bound to the law, the legislature will make laws to which they want others bound and to which they are willing to be bound themselves.<sup>178</sup> Despite the sentimentality a certain practice or mode of governance gains over time, its durability should be based on utility, not age. Although the common law tort system is certainly preferable to individuals lawlessly vindicating rights without the civility, force, and restraint of law, the system is imperfect. As customs should give way when no longer productive, a more efficient and effective mass tort adjudication mechanism is preferable to the common law system.

Under Locke's functional view, government's underlying purpose is to serve the human condition. Writing on the nature and function of law, Locke posited, "[a] civil law is nothing but the agreement of a society of men either by themselves, or one or more authorised by them, determining the rights, and appointing rewards and punishments to certain actions of all within that society."<sup>179</sup> It is within the realm of civil law to regulate and preserve property, and all such power should only be used for public good.<sup>180</sup> Speaking to the purpose

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174. *Id.*

175. *Id.*

176. See generally Edmund M. Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 YALE L.J. 229, 229 (1922) (noting "[t]he marvelous capacity of a Latin phrase to serve as a substitute for reasoning").

177. See LOCKE, SECOND TREATISE, *supra* note 94, at 58.

178. *Id.*

179. John Locke, *Law*, reprinted in LOCKE: POLITICAL ESSAYS, *supra* note 106, at 269–70.

180. See LOCKE, SECOND TREATISE, *supra* note 94, at 18.

of the commonwealth, Locke wrote, "[t]he end of civil society is civil peace and prosperity, or the preservation of the society and every member thereof in a free and peaceable enjoyment of all the good things of this life that belong to each of them . . . ."<sup>181</sup> Therefore, in developing laws a state should remain mindful that its purpose is to meet this underlying goal, and not merely to preserve dogma.

Locke recognized, however, that people are often not governed by reason: "[t]he three great things that govern mankind are reason, passion, and superstition. The first governs a few, the two last share the bulk of mankind, and possess them in their turns; but superstition most powerfully and produces the greatest mischiefs."<sup>182</sup> People commonly favor a certain rule because they feel a principle is right or wrong, but it is far easier to *feel* something is right or wrong than to articulate *why* something feels right or wrong. On some level, democratically developed law implies that governing rules will reach results that feel right, but it is important that the rules feel right for the right reasons. Regardless of how a law came to be, with time people lose sight of the law's purpose and come to see the law as justifying its own existence.<sup>183</sup> Over time, even a well-reasoned law that reaches a good result may become ineffective.

Locke advocated reforming customs to match modern realities. In the context of aligning legislative representation with current population distribution, he explained: "[t]hings of this world are in so constant a flux, that nothing remains long in the same state."<sup>184</sup> Customs often remain in place after "the reasons of them are ceased," thus producing "gross absurdities."<sup>185</sup> Barriers to beneficial social reforms include superstition, ignorance, intellectual laziness, partisanship, and self-interest; but Locke pressed that human reason and intelligence allow for progress if the goals of social institutions can first be identified, which will allow the institutions' procedural and substantive rules to be reformulated to better meet the institutions'

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181. John Locke, *Civil and Ecclesiastical Power*, reprinted in LOCKE: POLITICAL ESSAYS, *supra* note 106, at 216.

182. John Locke, *Reason, Passion, Superstition*, reprinted in LOCKE: POLITICAL ESSAYS, *supra* note 106, at 280; see also Grant, *supra* note 129, at 341 ("[Locke argued that] men are not rational maximizers of utility; Locke does not describe men according to the model economic man of contemporary theory. By and large, their conduct in life is not governed by the independent calculation of how best to satisfy their individual interests. On the contrary, their conduct is most likely to be governed by common opinions and beliefs as to what constitutes a happy and respectable life. And men are often led to quite unreasonable things on the basis of these powerful social norms.").

183. LOCKE, SECOND TREATISE, *supra* note 94, at 86.

184. *Id.*

185. *Id.*

goals.<sup>186</sup> After determining the function of a social institution, one can analyze its efficacy at serving that function and whether the function is still needed by society. This analysis rejects ontological arguments on the nature of law grounded only in tradition or custom. Critical evaluation of social institutions forces a clear understanding of their goals, the rationality of those goals, and the efficacy of the means used to achieve those goals. When a goal is suboptimally served by the current mechanism purported to achieve it, rationality demands reforming the mechanism, regardless of illogical appeals grounded only on tradition or custom.<sup>187</sup>

Locke's system of rationally examining institutions and reforming them to better meet their goals is illustrated by his views on the relationship of husband and wife.<sup>188</sup> Locke argued that marriage should not be governed by the absolute power of man over woman because this would cause women to avoid marriage.<sup>189</sup> He argues that, "the ends of matrimony requiring no such power in the husband, the condition of conjugal society put it not in him, it being not at all necessary to that state."<sup>190</sup> Rather, matters of a marriage not essential to the state should be governed by the couple through mutual agreement.<sup>191</sup> Applying the same rationality to the governance of a marriage as he applies to governance of a state, Locke propounded, "[c]onjugal society could subsist and attain its ends without [absolute power of husbands] . . . nothing being necessary to any society, that is not necessary to the ends for which it is made."<sup>192</sup> Locke's rationality requires that rules exist only to serve a valid function; without a valid function, no rule is necessary or proper.

#### D. Lockean Implications for Tort Law

Locke's formulation of natural law is not an obstacle to social change. He saw that societies changed and that law was a vehicle to foster and promote positive change in human associations.<sup>193</sup> David

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186. See Resnick, *supra* note 41, at 82 ("Locke's great contribution to modern liberal thought arose from his commitment to a critical rationalism that undermined the foundations of traditional society and thoroughly rejected traditional modes of thought grounded in irrational appeals to custom and historical precedent. Locke was aware of social change and the need to defend new and more rational approaches to solving the problems of social order created by a society in transition. . . . He believed that human reason could delineate the rational purposes of human institutions and could discover appropriate rational methods for achieving them.").

187. See *id.* at 89-90.

188. LOCKE, *SECOND TREATISE*, *supra* note 94, at 52.

189. *Id.*

190. *Id.*

191. See *id.*

192. *Id.*

193. See Resnick, *supra* note 41, at 85.

Resnick reads Locke to say, “[n]ot only must we realize that as a practical matter different times call for different social arrangements, but we must also be skeptical of those who deny the facts of social change and attempt to preserve outmoded institutions that no longer function as they once did.”<sup>194</sup>

Locke’s notion of property regulation imposes a duty on government to set property rights in a manner that prevents the hindrance of labor.<sup>195</sup> It naturally follows that vindication of rights arising from injury to person or property—both of which Locke refers to “by the general name property”—should be accomplished by the means that best promote efficiency.<sup>196</sup> In order to balance interests in the preservation of property and person with interests in economic efficiency, the tort system should take the form that achieves optimal deterrence. Optimal deterrence is in everybody’s best interest *ex ante* because preventing unreasonable risk—risk that by definition creates more harm than good—promotes economic efficiency, which is in everyone’s best interest when no one knows who will bear the harms that materialize from risk.<sup>197</sup>

Locke supported formal restraints typical of the traditional tort system, finding great weakness in the state of nature because every individual has executive power to enforce his own rights:

[I]t is unreasonable for men to be judges in their own cases, that self-love will make men partial to themselves and their friends: and, on the other side, that ill-nature, passion, and revenge will carry them too far in punishing others; and hence nothing but confusion and disorder will follow: and that therefore God hath certainly appointed government to restrain the partiality and violence of men.<sup>198</sup>

Although civil litigation provides a civilized means for fulfilling the end of corrective justice, individual tort claim autonomy frustrates class actions in a manner similar to the chaos Locke saw resulting from an absence of civil remedies to disputes. Namely, a person driven by self-interest or motivated by revenge may act in a way that frustrates the class’s suit and undermines the achievement of optimal deterrence. In the class action context, opt-outs may benefit defendants by splintering the class and allowing asymmetries of scale to overpower plaintiffs’ claims.<sup>199</sup>

In Locke’s time, the traditional tort system was seen as an adequate, peaceful means of addressing small-scale torts. John Goldberg

194. *Id.* at 115.

195. Mark Goldie, *Introduction* to JOHN LOCKE: TWO TREATISES OF GOVERNMENT (Mark Goldie ed., Everyman 1993), *reprinted in* THE SELECTED POLITICAL WRITINGS OF JOHN LOCKE, *supra* note 94, at 357, 359.

196. LOCKE, SECOND TREATISE, *supra* note 94, at 72.

197. See Rosenberg, *Decoupling*, *supra* note 29, at 1880, 1891.

198. LOCKE, SECOND TREATISE, *supra* note 94, at 22.

199. See *supra* note 4 and accompanying text.



explains Blackstone's vision of tort law as an outgrowth of the social contract. To Blackstone, tort:

[P]rovided the means by which individuals could vindicate their rights against wrongful invasions by others. Just as the structure of English government—King, Parliament, and common law—helped protect rights against official tyranny, so tort defined and defended the right not to be battered, detained, defamed, dispossessed or otherwise injured by others. Tort therefore helped fulfill the social contract. Upon entering civilized society, individuals give up their natural right to wreak vengeance on their wrongdoers in exchange for the positive legal power to invoke the apparatus of the state to obtain legal redress from them.<sup>200</sup>

In this view, surely the traditional tort system is preferable to lawlessly wreaking vengeance—in the mass tort context this would presumably take the form of assaulting corporate officers, managers, and researchers.

The modern problem is that traditional civil suits are not an effective means to address alleged mass torts. Although a champion of individual rights, Locke's theory of commonwealth-vindication of rights exemplifies a notion of collective justice. His commitment to individual rights does not preclude viewing tort law as more than a mechanism for an abstract moral notion of corrective justice. Locke reasoned that the commonwealth's civil justice system was designed to serve the same ends sought through the natural law right to punish transgressions—the vindication of wrongs (which acted as a form of victim compensation due to its reparation component) and the deterrence of future wrongdoing.<sup>201</sup>

Mandatory class action is justified on the same grounds Locke used to argue for majority rule in government. Allowing individuals to opt out of laws they do not agree with "would make the mighty leviathan of a shorter duration than the feeblest creatures, and not let it outlast the day it was born in, . . . for where the majority cannot conclude the rest, there they cannot act as one body, and consequently will be immediately dissolved again."<sup>202</sup> When man enters civil society, he relinquishes "his power to punish offences against the law of nature, in prosecution of his own private judgment."<sup>203</sup> The commonwealth punishes transgressions "for the preservation of the property of all the members of that society, as far as is possible."<sup>204</sup> And when a civil society decides upon a means for addressing tort adjudication, all members are likewise bound. If the preservation of property is not best served by the traditional tort suit, there is no reason to rely on

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200. Goldberg, *supra* note 13, at 1504–05 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 55–56, 120–37 (facsimile ed. 1979) (1765–69)).

201. See LOCKE, SECOND TREATISE, *supra* note 94, at 21–22.

202. *Id.* at 60.

203. *Id.* at 54.

204. *Id.*

this suboptimal system merely because it is custom.<sup>205</sup> If an alternative tort system proves more effective and efficient, classical notions of justice—the underpinnings of American political philosophy—are not a barrier to its adaptation, but rather support reform.

## V. CONCLUSION

Although people entering a commonwealth give up the freedom inherent in the state of nature, they do so for better protection of life, freedom, and property.<sup>206</sup> Similarly, people through their government may agree *ex ante* to give up the right to individually pursue mass tort claims in order to optimally deter tortious injuries and provide optimal compensation for harm. By voluntarily giving up certain freedoms and binding oneself with others, an individual can increase her well-being. Perhaps because American culture greatly values freedom, we are reluctant to give up any autonomy. But our freedom is beneficial because it allows us to make choices, and those choices allow us to order our lives in ways that increase our fulfillment.<sup>207</sup> By binding ourselves to choices, however, we necessarily give up the freedom to have chosen differently. The freedom to bind ourselves—to give up a part of our freedom—makes our freedom worth having.

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205. *See supra* note 185 and accompanying text (noting that customs often remain in place after “the reasons of them are ceased,” thus producing “gross absurdities”).

206. LOCKE, *SECOND TREATISE*, *supra* note 94, at 73.

207. *See supra* note 53 (providing Nozick’s justification for the importance of individual autonomy).